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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1972

## No. 72-438

UNITED STATES OF AMERICA, *Petitioner*

vs.

EDWARD G. CHANDLER and ESTHER F. BORN, as Executors of the Will of Mary E. Baum, Deceased.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

**to the United States Court of Appeals for the Ninth Circuit**

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Respondents Edward G. Chandler and Esther F. Born, as executors of the will of Mary E. Baum, deceased oppose the petition of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of §22 of the Second Liberty Bond Act, §2040 of the Internal Revenue Code of 1954, and §20.2040-1 of the Treasury Regulations on Estate Tax (1954 Code) are set forth in Appendix D of the petition.

However, the Treasury Regulations on United States Savings Bonds cited in the petition on p. 2 and set forth in Appendix D, pp. 27-31, apparently are taken from 31 C.F.R., Cum. Supp. 1958. Footnote 2 on p. 4 of the petition says references "are to the eighth revision of the Regulations, which were in effect in 1961, when the bonds were transferred by the decedent to her granddaughters".

The government has apparently overlooked its stipulation in this case that:

> "12. A true copy of the Treasury Regulations governing the United States Savings Bonds Series E. is attached hereto as Exhibit 'D'." (Fully Stipulated Facts, p. 3, R. 17)

Exhibit "D" to the stipulation consists of 31 C.F.R., Part 315 (R. 49-66) and 31 C.F.R., Part 316 (R. 66-75), both Parts as amended February 26, 1954. This version of the regulations was in effect when the bonds were issued.

The section numbers and the language of the regulations cited in the petition differ from the stipulated provisions, but the crucial language upon which the government relies is similar in both versions. In this brief we shall refer to the stipulated version of the regulations as set forth in the record.

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**REASONS FOR DENYING THE WRIT**

In this case when the donor irrevocably delivered bonds to coowners named thereon, she relinquished dominion and control. The coowners in possession were entitled under the bond regulations to surrender the bonds

for cash, and the donor no longer had actual power to do so. The federal estate tax law regards substance more than form, and a careful reading of the bond regulations discloses no reason for imposing a federal estate tax in this case.

We doubt that the decisions of the courts below will materially burden the administration of the tax laws or management of the federal savings bond program. However, if the government believes otherwise, it is free to seek an amendment of the federal estate tax law or regulations; at least it could amend the bond regulations to spell out the interpretation for which it now contends.

(1) The basic applicable federal law is that "Section 2040 [of the Internal Revenue Code] is concerned only with beneficial interests possessed by a decedent as a joint tenant." *Estate of Chrysler v. Commissioner*, 361 F.2d 508, 510 (2nd Cir. 1966). The government has not cited any provision of the federal estate tax law or regulations which provides that one registered coowner of United States Savings Bonds is prohibited from giving the other registered coowner beneficial ownership by irrevocably delivering possession.

(2) Nor has the government cited any provision of the bond regulations which expressly so provides. In fact no provision of the bond regulations purports to regulate the rights of coowners to beneficial ownership as between themselves.

The bond regulations leave it to the coowners to determine who shall have the power to cash in the bonds. Reg. §315.45, subparagraph (a) (R. 61) provides:

> "During the lives of both coowners the bond will be paid to either coowner upon his separate request without requiring the signature of the other coowner."

The bond regulations also make it clear that possession is essential for payment. Reg. §315.22 (R. 58) provides in part:

> "In any case payment will be made only following presentation and surrender of the bond for that purpose."

(3) A relinquishment of one coowner's interest in a bond by delivery of possession with intention of making a complete, irrevocable, gift is not a prohibited "transfer" of the bond within the meaning of the bond regulations. The prohibitions against transfer are stated as follows:

> §315.11 (R. 56). "Savings bonds are not transferable and are payable only to the owners named thereon . . ."
>
> §316.8 (R. 69). "Bonds of Series E will not be transferable, and will be payable only to the owner named thereon . . ."

Taken in context, the word "transferable" seems to refer to a transfer of the bond to persons who are *not* "owners named thereon". The regulations say nothing about delivery of possession to a coowner who is named on the bond and who of course is entitled to payment.

(4) The bond regulations do not provide that the form in which a Series E savings bond is registered is

always "conclusive" as to actual ownership. §315.2 (R. 54) provides in part:

> ". . . The form of registration used must express the actual ownership of and interest in the bond and, *except as otherwise specifically provided in these regulations*, will be considered as conclusive of such ownership and interest." (Emphasis added.)

One exception to the "conclusive" effect of registration specifically provided in Reg. §315.13 (R. 56) is the following:

> *"Judicial proceedings (judgment creditors, trustees in bankruptcy, receivers of insolvents' estates and conflicting claimants).*—A claim against an owner or coowner of a savings bond and conflicting claims as to ownership of or interest in such bond as between coowners or the registered owner and a designated beneficiary, will be recognized when established by valid judicial proceedings and payment or reissue will be made upon presentation and surrender of the bond, except as follows:
>
> (a) No such proceedings will be recognized if they would give effect to an attempted voluntary transfer inter vivos of the bond or would defeat or impair the rights of survivorship conferred by these regulations upon a surviving coowner or beneficiary."

Paragraph (a)'s exception to the exception reaffirms the provisions saying that bonds are not "transferable" but, as stated above, this does not seem to apply to a gift from one coowner to another coowner *named on the bond*. Moreover since they are already both owners of the bond within the meaning of the bond regulations,

such a gift would not seem to constitute a "transfer inter vivos *of the bond*".

Paragraph (a) would also invalidate proceedings which would "defeat or impair the rights of survivorship . . . (of) a surviving coowner". However, in the case at bar, the rights of the surviving coowners are fully recognized and effectuated. With respect to the donor, the stipulated facts are that she voluntarily waived or relinquished her right to survivorship. In doing so she did not "defeat or impair" her rights of survivorship in ordinary meaning of language. The bond regulation obviously is intended to protect the rights of bondholders, not to deprive them of a fundamental right to give property away. Nor is the regulation intended to create a trap for an unwary bondholder—which would be the result of the government's arguments.

(5) *Estate of Curry v. United States,* 409 F.2d 671 (6th Cir. 1969), relied upon by the government as creating a conflict between courts of appeals, was decided without benefit of an adversary proceeding (letter from taxpayer's attorney to the court of appeals' clerk dated May 24, 1968, R. 89). The Sixth Circuit did not consider the points on which Judge Sweigert based his decision which was affirmed by the Ninth Circuit in the case at bar. In *Curry,* the court merely reaffirmed the rule of *Guldager v. United States* 204 F.2d 487 (6th Cir. 1953) that rights or estates in savings bonds are created by federal contract and controlled by federal law —a proposition that has never been disputed in this case. *Guldager* had nothing to do with the estate tax nor with a gift of coownership bonds. The court held that where

state law of tenancies by the entireties squarely conflicted with federal bond regulations, the federal law controlled. (The court held that savings bonds were subject to levy of execution by a judgment creditor of the husband.)

In *Curry* the court also relied on several state court cases invalidating attempted transfers of bonds to persons who were strangers to the bonds and who could not cash them under express provisions of the bond regulations. The court did not mention that the bond regulations permit a coowner named on a bond to cash it in.

When analyzed, *Curry* is weak authority for the two subsequent cases which have followed it and are cited in the petition, p. 6, fn. 3.

(6) In this case the district court (Judge Sweigert) considered the legislative history of the Second Liberty Bond Act and the purposes of the Treasury Department Bond Regulations; it carefully construed the language of the bond regulations, read as a whole and with a view to their purposes. The court also analyzed the case law on the subject, including the conflicting decisions of the Third and Sixth Circuits and related decisions of the United States Supreme Court, and concluded:

> "In short, we find nothing in either the language, or the history or the purpose of the regulations which reasonably calls for exacting an estate tax from the estate of Mary E. Baum under the stipulated circumstances of this record."

We believe that Judge Sweigert's reasoning is sound and will probably be followed by other courts. The supervision of this Court is not needed at this time.

Moreover, if the government now wishes to contend for the first time in this litigation that the 1961 version of the bond regulations governs, it should be barred by its stipulation that the 1954 version governs.

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**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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